

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKO LOTT,

Petitioner,

Case No. 1:08-cv-481

v.

Honorable Robert J. Jonker

JOHN PRELESNIK,

Respondent.

OPINION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254.

This matter is before the Court upon Petitioner's motion for a stay of the proceedings pending exhaustion of new claim in the state courts (docket #5).

Factual Background

Petitioner Ricko Lott presently is incarcerated with the Michigan Department of Corrections and housed at the Richard A. Handlon Correctional Facility. He pleaded guilty in the Ingham County Circuit Court to one count of assault with intent to commit murder, MICH. COMP. LAWS 750.83; and one count of armed robbery, MICH. COMP. LAWS § 750.529. Shortly after pleading guilty, Petitioner moved to withdraw his guilty plea. The motion was denied. On August 3, 2005, he was sentenced to concurrent terms of 25 to 50 years. Petitioner sought leave to appeal his conviction in both the Michigan Court of Appeals and the Michigan Supreme Court, both of which denied leave. The supreme court order denying leave to appeal was issued on February 27, 2007. In both courts, Petitioner raised the same six issues raised in his habeas petition.

In his motion to stay, Petitioner states that he “has several issues he plans to raise in motion to the trial court pursuant to M.C.L. 6.500, and would like to exhaust these issues so he may add them to his habeas if needed.” (Mot. to Stay, 3, docket #5.)

Discussion

Before the Court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to “fairly present” federal claims so that state courts have a “fair opportunity” to apply controlling legal principles to the facts bearing upon a petitioner’s constitutional claim. *See O’Sullivan*, 526 U.S. at 842; *Picard v. Connor*, 404 U.S. 270, 275-77 (1971), *cited in Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *Anderson v. Harless*, 459 U.S. 4, 6 (1982). To fulfill the exhaustion requirement, a petitioner must have fairly presented his federal claims to all levels of the state appellate system, including the state’s highest court. *Duncan*, 513 U.S. at 365-66; *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990). “[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan*, 526 U.S. at 845.

The six claims raised in Petitioner’s original habeas petition are properly exhausted because they were presented in the Michigan Court of Appeals and the Michigan Supreme Court. Petitioner now wishes to add to his habeas petition several new claims that have not been presented in the state courts, and, thus, are unexhausted. An applicant has not exhausted available state remedies if he has the right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c). Petitioner may present his unexhausted claims in a motion for

relief from judgment under MICH. CT. R. 6.500 *et. seq.* Under Michigan law, one such motion may be filed after August 1, 1995. MICH. CT. R. 6.502(G)(1). Petitioner has not yet filed his one allotted motion. Therefore, he has an available state-court remedy.

A habeas petition that raises some claims that are exhausted and some that are not exhausted is a “mixed” petition. Under *Rose v. Lundy*, 455 U.S. 509, 22 (1982), district courts are directed to dismiss mixed petitions without prejudice in order to allow petitioners to return to state court to exhaust remedies. However, since the habeas statute was amended to impose a one-year statute of limitations on habeas claims, *see* 28 U.S.C. § 2244(d)(1), dismissal without prejudice often effectively precludes future federal habeas review. This is particularly true after the Supreme Court ruled in *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001), that the limitations period is not tolled during the pendency of a federal habeas petition. As a result, the Sixth Circuit adopted a stay-and-abeyance procedure to be applied to mixed petitions. *See Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002). In *Palmer*, the Sixth Circuit held that when the dismissal of a mixed petition could jeopardize the timeliness of a subsequent petition, the district court should stay the proceedings until the petitioner has exhausted his claims in the state court. *Id.*; *see also Griffin v. Rogers*, 308 F.3d 647, 652 n.1 (6th Cir. 2002).

Petitioner’s application is subject to the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1). Under § 2244(d)(1)(A), the one-year limitation period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” Petitioner appealed his conviction to the Michigan Court of Appeals and Michigan Supreme Court. The Michigan Supreme Court denied his application on February 27, 2007. Petitioner did not petition for certiorari to the United States Supreme Court, though the

ninety-day period in which he could have sought review in the United States Supreme Court is counted under § 2244(d)(1)(A). *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The ninety-day period expired on May 28, 2007. Accordingly, Petitioner had one year, until May 28, 2008, in which to file his habeas petition. Because the statute of limitations has expired, dismissal of the petition for lack of exhaustion would render any subsequent petition untimely. Thus, a stay of the proceeding is warranted under *Palmer*.

The Supreme Court has held, however, that the type of stay-and-abeyance procedure set forth in *Palmer* should be available only in limited circumstances because over-expansive use of the procedure would thwart the AEDPA's goals of achieving finality and encouraging petitioners to first exhaust all of their claims in the state courts. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005). In its discretion, a district court contemplating stay and abeyance should stay the mixed petition pending prompt exhaustion of state remedies if there is "good cause" for the petitioner's failure to exhaust, if the petitioner's unexhausted claims are not "plainly meritless" and if there is no indication that the petitioner engaged in "intentionally dilatory litigation tactics." *Id.* at 278. Moreover, under *Rhines*, if the district court determines that a stay is inappropriate, it must allow the petitioner the opportunity to delete the unexhausted claims from his petition, especially in circumstances in which dismissal of the entire petition without prejudice would "unreasonably impair the petitioner's right to obtain federal relief." *Id.*

Consequently, if Petitioner wishes to pursue his unexhausted claims in the state courts, he must show cause within thirty days why he is entitled to a stay of these proceedings. Specifically, Petitioner must identify his unexhausted claims and show: (1) good cause for his failure to exhaust before filing his habeas petition; (2) that his unexhausted claims are not plainly meritless;

and (3) that he has not engaged in intentionally dilatory litigation tactics. *See Rhines*, 544 U.S. at 277-78. If Petitioner fails to meet the *Rhines* requirements for a stay or fails to timely comply with the Court's order, the Court will review only his exhausted claims. Alternatively, Petitioner may withdraw his motion for a stay and proceed on his exhausted claims.

An Order consistent with this Opinion will be entered.

Dated: February 27, 2009

/s/ Hugh W. Brenneman, Jr.
HUGH W. BRENNEMAN, JR.
United States Magistrate Judge